

**BHAVANASH SHARMA GURCHAN SINGH SHARMA
v. JAGMOHAN SINGH SANDHU & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
VAZEER ALAM MYDIN MEERA JCA
MARIANA YAHYA JCA
AZIMAH OMAR JCA

[CIVIL APPEAL NOS: W-04(IM)(NCVC)-152-04-2021
& W-04(IM)(NCVC)-235-05-2021]
13 OCTOBER 2023

Abstract – *The issue as to whether a conduct of a litigant (or his solicitors) is contemptuous does not necessarily relate to whether or not such contempt would affect the merits or the determination of a case on its merits. When we speak of proper and ethical conduct of litigants and solicitors as officers of the court, such matters transcend matters of merits. For justice to be seen to be done, the manner and method of solicitors that is chosen to prop up their clients' case must also be made in solemn honesty, diligence, and integrity. A witness statement that is knowingly filed notwithstanding the full knowledge that the solicitors had not communicated, consulted nor met with the witness is a conduct that goes beyond a 'mistake' and encroaches the realm of inconsiderate presumptions and dishonesty. Any conduct which may risk the admission of false testimony is an affront to the administration of justice and shall therefore be considered a contempt of court.*

CIVIL PROCEDURE: *Contempt of court – Proceedings – Appeal – Witness statement – Unsigned witness statement filed by solicitors without communication or confirmation with witness – Whether callous conduct of solicitors in filing impugned witness statement accorded contempt of court – Whether inadmissibility or non-reference of impugned witness statement erased solicitors' contemptuous conduct – Whether any conduct risking admission of false testimony an affront to administration of justice – Whether lower court's decision in dismissing application to cite relevant litigant and solicitors for contempt decision appealable – Rules of Court 2012, O. 55*

EVIDENCE: *Witness – Witness statement – Unsigned witness statement filed by solicitors without communication or confirmation with witness – Whether callous conduct of solicitors in filing impugned witness statement accorded contempt of court – Whether inadmissibility or non-reference of impugned witness statement erased solicitors' contemptuous conduct – Whether any conduct risking admission of false testimony an affront to administration of justice*

- A These two appeals ('Appeal 152 and Appeal 235') revolved around an unsigned witness statement of one David Allen Martinez ('impugned WS') which was filed by the respondent *via* the respondent's solicitors without ever consulting or even meeting David Allen Martinez ('Allen Martinez').
- B However, the appellant withdrew Appeal 152 and only proceeded with Appeal 235 which was the appellant's appeal against the concurrent decisions of the Sessions Court and the High Court to dismiss the appellant's application to cite the respondent and the respondent's solicitors for contempt. The facts of the present appeal began from the filing of six witness statements (inclusive of the impugned WS) by the respondent's solicitors.
- C Ordinary prudence and trite ethical obligation would dictate that solicitors must not abuse the Rules of Court 2012's ('ROC') allowance to use witness statements as means of examination-in-chief and thus, solicitors must ensure that the testifying witness confirmed that the contents of the witness statement to be that witness' own words and testimony prior to the filing of the witness statement. However, it was later revealed and admitted by the
- D respondent's own solicitors that the impugned WS was filed without any communication, confirmation nor meeting with Allen Martinez. Subsequently, Allen Martinez filed an affidavit denying each and every answer in the impugned WS and that he had neither communicated with nor met the respondent's solicitors prior to the filing of the impugned WS.
- E Thereafter, the appellant expeditiously filed an application to expunge the impugned WS. The appellant accordingly filed an application for leave to initiate contempt proceedings against the respondent and his solicitors. The Sessions Court allowed the leave application. Thus, the appellant consequently filed an application to cite the respondent for contempt
- F ('encl. 111'). To challenge encl. 111, the respondent's solicitors admitted to have never met Allen Martinez and never sought personal confirmation from Allen Martinez prior to the filing of the impugned WS. Instead, both solicitors adopted a deflective stance in blaming their own client, the respondent (in that the impugned WS was filed on the respondent's instructions and the respondent's supposed confirmation and finalisation
- G with Allen Martinez). The Sessions Court dismissed encl. 111 primarily on the ground that the unsigned impugned WS shall not affect the court's determination on merits. Upon appeal, the High Court dismissed the appellant's appeal mainly on the following reasons (i) the Sessions Court's decision in dismissing encl. 111 was not a 'decision' which was appealable under O. 55 of the ROC and was merely a ruling; and (ii) the Sessions Court's ruling on the committal application was unappealable as the committal application was premature (and *sub judice*) because the subject witness, Allen Martinez, had not yet been fully heard before the court. Hence, this appeal. The issues that arose herein were (i) whether the Sessions Court's analysis
- I of the alleged contemptuous conduct based on the admissibility and relevancy of the impugned WS at trial was appropriate in law ('issue 1'); and

(ii) whether the High Court's finding that the Sessions Court's dismissal of encl. 111 (committal application) was an unappealable 'ruling' instead of a 'decision' was appropriate in law ('issue 2').

Held (allowing appeal)

Per Azimah Omar JCA delivering the judgment of the court:

- (1) Apart from the core merits of a case, the manner and method a solicitor chooses to apply the ROC's allowance of a witness statement is a separate ethical issue altogether. Thus, the Sessions Court's reliance on the admissibility and relevancy to the impugned WS as evidence at trial was unfortunately misplaced. It would be unsavoury and unwise to allow a state of practice or precedent that solicitors are allowed to put together any beneficial narrative they see fit as witness' testimony (without communicating or confirming with that witness) just so that they can take a chance that either (i) a witness under pressure of the witness stand would just play along and confirm whatever the solicitor suggests to be that witness' supposed testimony; and (ii) in case the witness outright denies ever consenting to the contents of a witness statement, that solicitor can just 'clean house' and opt not to call that witness nor refer to the witness statement that the solicitor had wrongly prepared and filed. Such a precedent was certainly undesirable. (paras 17 & 18)
- (2) The filing of the impugned WS was not merely a 'mistake'. The impugned WS was knowingly filed notwithstanding the full knowledge that the solicitors had not communicated, consulted, nor have met Allen Martinez. The solicitors knew they had not obtained proper confirmation from the intended witness and yet they found it acceptable to ignore the absence of personal confirmation. Instead, the solicitors felt it was appropriate to just rely on the instructions and confirmation of their client. The solicitors could not entrust the responsibility to their client to obtain proper confirmation from the intended witness. The solicitors held the ultimate key to file the impugned WS, and even without communicating with Allen Martinez, the solicitors saw it fit to proceed. (para 18)
- (3) The entire series of events had nothing to do with the merits of the parties' case, and yet the same series of events clearly revealed a conduct which went beyond a 'mistake' and encroached the realm of inconsiderate presumptions and dishonesty. It was not the contents nor the veracity of the contents of the impugned WS that irritated or offended the face of the court, but it was the callous conduct of the solicitors in filing the impugned WS that accorded contempt of court. Thus, although the impugned WS would not be admissible as evidence under s. 73A of the Evidence Act 1950 as it was unsigned, the

- A inadmissibility or the non-reference of the impugned WS did not at all
erase or evaporate the solicitors' contemptuous conduct of improperly
filing the impugned WS. Whether or not the impugned WS was referred
to or even used at trial had nothing to do with the respondent's
solicitors' conduct of improperly filing the impugned WS without ever
consulting or personally confirming with Allen Martinez. It was an
B affront to justice for the solicitors to 'coach' a witness, what more to
insist a solicitor's own words as a witness's written testimony. (para 21)
- (4) The fact that the case had already been put through full trial and had
been determined in favour of the respondent, still did not relinquish the
C respondent's contemptuous conduct in improperly filing the impugned
WS. There had never been a rule or precedent that contempt follows the
event or outcome of the main litigation nor should there ever be such
rule of law. Contempt remains a contempt no matter how meritorious
the main case of the contemnor (or contemnor's client) would be. Any
D conduct which may risk the admission of false testimony is an affront
to the administration of justice and shall be considered as contempt of
court. Thus, the deterrence must go so far as to eliminate the 'risk' of
false testimony and not only actual admission or reference to false
testimony. Therefore, the argument that there was no contempt just
E because the impugned WS was not admitted as evidence did not at all
wash the stain of contempt. (paras 23-26)
- (5) Apart from a solicitor's duty to enquire after the filing of a witness
statement, a solicitor would also be put on enquiry, wherever and
whenever practicable before the filing of the witness statement, to check
F with the witness himself, whether those facts in the witness statement
were true. It should be obvious that a solicitor must practice utmost due
diligence to verify the authenticity of any document (inclusive of witness
statements) prior to the filing of the same. There should be no reason
whatsoever that witness statements should be exempted from the same
G duty of due diligence. And the respondent's contempt was considerably
more explicit due to the admission that the respondent's solicitors did
not even bother to reach out to Allen Martinez for a personal
confirmation of the contents of the impugned WS. Hence, the answer to
issue 1 was in the negative. It was plainly wrong for the Sessions Court
to dismiss encl. 111 merely on the basis of the inadmissibility and
H non-reference of the impugned WS at trial. Whether or not the
impugned WS was admitted as evidence to affect the merits of the case
was altogether a separate matter than that of the manner and method the
impugned WS was unethically prepared and filed by the respondent.
(paras 28 & 31)
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- (6) The Sessions Court's decision to dismiss encl. 111 was indeed appealable before full trial under O. 55 r. 5 of the ROC. The appellant applied for committal proceedings, and the Sessions Court decided to dismiss encl. 111 and even ordered costs against the appellant. This was a decision and an order of the Sessions Court before trial which fell squarely under O. 55 r. 5 of the ROC. Further, the issue of admittance or reference to the impugned WS at trial was altogether a separate issue from the improper and unethical manner in which the impugned WS was prepared and filed by the respondent. Thus, the committal proceeding bore no effect against the merits of the case at trial. The contemptuous conduct did not depend on the falsehood of the contents of the impugned WS, but instead the unethical manner the impugned WS was prepared and filed. This court could not simply allow the respondent to be left unscathed considering their improper conduct in preparing and filing the impugned WS. Thus, issue 2 was also answered in the negative. (paras 35-38)

Case(s) referred to:

Kyle v. Legal Practitioners' Complaints Committee [1999] WASCA 115 (*refd*)
Rajasooria v. Disciplinary Committee [1955] 1 LNS 107 (*refd*)
Seow Hoon Hin v. Hartalega Holdings Bhd & Ors [2019] 1 LNS 779 CA (*refd*)
Sharma Kumari Oam Parkash v. PP [2000] 1 LNS 123 HC (*refd*)
Tan Sri Datuk Nadraja Ratnam v. Murali Subramaniam [2017] 1 LNS 2263 HC (*refd*)

Legislation referred to:

Evidence Act 1950, s. 73A
 Rules of Court 2012, O. 55 rr. 1, 3, 5

For the appellant - Malik Imtiaz Ghulam Sarwar & Lim Yvonne; M/s Bhavanash Sharma
For the respondent - Harpal Singh Grewal, Rathi Jebaratnam, Bernard Francis, Meneesha Kaur & Nahvinah Selvaraj; M/s Dinesh Ratnarajah Partnership

[Editor's note: For the High Court judgment, please see *Bhavanash Sharma Gurchan Singh Sharma v. Jagmohan Singh Sandhu* [2021] 1 LNS 1278 (*overruled*).]

Reported by Suhainah Wahiduddin

JUDGMENT

Azimah Omar JCA:

Background Facts

[1] There are two appeals before us. These two appeals revolve around an unsigned witness statement of one, Mr David Allen Martinez ("impugned WS") which was filed by the respondent (*via* the respondent's solicitors, Messrs Richard Talalla & Harun) without ever consulting or even meeting Mr David Allen Martinez ("Allen Martinez") on 28 February 2020. The

A respondent for both these appeals before this court is Jagmohan Singh Sandhu. Whilst the appellant in these two appeals is Bhavanash Sharma a/1 Gurchan Singh Sharma (Practising under the name and style of “Bhavanash Sharma”).

B [2] Rayuan Sivil No: W-04(IM)(NCVC)-152-04-2021 (“Appeal 152”) is the appellant’s appeal against the concurrent decisions of the Sessions Court and the High Court to dismiss the appellant’s application to expunge the impugned WS. Meanwhile, Rayuan Sivil No: W-04(IM)(NCVC)-235-05-2021 (“Appeal 235”) is the appellant’s appeal against the concurrent decisions of the Sessions Court and the High Court to dismiss the appellant’s application to cite the respondent and the respondent’s solicitors for contempt.

C [3] At the beginning of the hearing of both appeals on 20 February 2023, learned counsel for the appellant has informed us that the appellant intended to withdraw Appeal 152 and only proceed with Appeal 235. Thus, we shall only proceed to determine the propriety of the Sessions Court’s and High Court’s decisions in dismissing the appellant’s application to cite the respondent (and the respondent’s solicitors) for contempt.

D [4] For a better understanding of the matter at hand, it is necessary to set out the facts of the case that has led to the filing of Appeal 235 by the appellant. Nonetheless, we are most aware that the present appeal (and proceedings for contempt) has no nexus at all to the factual matrix and merits of the parties’ dispute. In fact, we are minded as not to disturb the previous courts’ determination on merits. Thus, the relevant facts which ought to be considered by us are only the facts revolving around the preparation and filing of the impugned WS by the respondent *via* his solicitors.

E [5] Considering the proper limited scope above, the facts of the present appeal began from the filing of six witness statements (inclusive of the impugned WS of Allen Martinez) by the respondent’s solicitors on 28 February 2020. Ordinary prudence and trite ethical obligation would dictate that solicitors must not abuse the Rules of Court 2012’s allowance to use witness statements as means of examination-in-chief and thus, solicitors must ensure that the testifying witness confirms that the contents of the witness statement to be that witness’ own words and testimony prior to the filing of the witness statement. Whether the witness statement was later signed and admitted before the court is distinctly a separate matter of procedure of admitting and adducing evidence into court. It is a basic rule of law and ethics that a solicitor should not put his own words and narrative into the mouth of a witness.

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[6] However, it is the exact cardinal rule above which the respondent's solicitors seem to have breached when it was later revealed and admitted by the respondent's own solicitors that the impugned WS was filed without any communication, confirmation, nor meeting with Allen Martinez. A

[7] On 3 March 2020, Allen Martinez filed an affidavit denying each and every answer in the impugned WS. Most importantly, Allen Martinez averred that he had neither communicated with nor met the respondent's solicitors prior to the filing of the impugned WS. Thereafter, the appellant expeditiously filed an application to expunge the impugned WS. B

[8] In a startling admission, the respondent's solicitors filed an affidavit in reply on 29 May 2020 to challenge the appellant's expungement application, admitting that the firm had filed the impugned WS without meeting Allen Martinez and was relying on the plaintiff's instruction and supposed 'confirmation' that the plaintiff had finalised the contents of the impugned WS with Allen Martinez. This admission was later reaffirmed in a series of affidavits by the respondent's solicitors filed during the contempt proceedings. C D

[9] Upon this revelation, the appellant accordingly filed an application for leave to initiate contempt proceedings against the respondent and his solicitors on 24 July 2020. On 30 July 2020, the Sessions Court allowed the leave application. Thus, the appellant consequently filed an application to cite the respondent for contempt on 5 August 2020 ("encl. 111"). E

[10] Notwithstanding the impending contempt proceedings, the main trial of the case proceeded on. Thus, on 23 September 2020, Allen Martinez attended the court as the appellant's witness and testified that the earlier impugned WS was filed without his consent or knowledge. F

[11] To challenge encl. 111, the respondent's solicitors, Mr Mark Robin Talalla, and Mahadeva a/l Gnaneswaran, filed their respective affidavits in reply. Both solicitors admitted to having never met Allen Martinez and never sought personal confirmation from Allen Martinez prior to the filing of the impugned WS. Instead, both solicitors adopted a deflection stance in blaming their own client, the respondent, in that the impugned WS was filed on the respondent's instructions and the respondent's supposed confirmation and finalisation with Allen Martinez. We have perused both the affidavits of the respondent's solicitors and have identified the following shared similarities: G H

- (i) both solicitors admitted that they have never met Allen Martinez;
 - (ii) both solicitors admitted that they have proceeded to file the impugned WS despite not personally have met or discussed the contents of the impugned WS with Allen Martinez;
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- A (iii) both solicitors put the blame on their client (the respondent), where they had relied solely on the respondent's instruction and supposition that the respondent had finalised the contents of the impugned WS with Allen Martinez;
- B (iv) both solicitors had never personally sought out Allen Martinez's confirmation and just relied on the plaintiff's instructions to deduce that it is proper to file the impugned WS without ever communicating with Allen Martinez; and
- C (v) both solicitors were trying to hide their filing of the impugned WS on the argument that the impugned WS was unsigned and shall not be referred to in the course of trial.

The Sessions Court's Findings

- D [12] On 11 December 2020, the Sessions Court had dismissed encl. 111 primarily on the ground that the unsigned impugned WS shall not affect the court's determination on merits:
- (i) the filing of the impugned WS by the respondent's solicitors was just a 'mistake';
- E (ii) the respondent was not calling Allen Martinez to testify as their witness and was no longer relying on the impugned WS;
- (iii) the impugned WS was unsigned and shall not be taken into as evidence to be considered by the court; and
- F (iv) since the impugned WS is not evidence and is inadmissible for the court to consider, thus the circumstances revolving around the eventual filing of the impugned WS are academic.

The High Court's Findings

- G [13] Upon appeal, the High Court had dismissed the appellant's appeal on 10 May 2021 mainly on the following reasons:
- (i) the Sessions Court's decision in dismissing encl. 111 (contempt application) was not a 'decision' (which is appealable under O. 55 of the Rules of Court 2012) and was merely a ruling; and
- H (ii) the Sessions Court's 'ruling' on the committal application was unappealable as the committal application was pre-mature (and *sub judice*) because the subject witness, Allen Martinez, has not yet been fully heard before the court.

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The Appeal Before Us

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[14] We have perused both the Sessions Court's and High Court's grounds of judgment as well as the appellant's memorandum of appeal (alongside the relevant affidavits filed throughout the committal proceedings) and found that the appeal before us can be determined by answering the following issues:

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- (i) issue 1: whether or not the Sessions Court's analysis of the alleged contemptuous conduct based on the admissibility and relevancy of the impugned WS at trial was appropriate in law; and
- (ii) issue 2: whether or not the High Court's finding that the Sessions Court's dismissal of encl. 111 (committal application) was an unappealable 'ruling' instead of a 'decision' was appropriate in law.

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Issue 1

Whether Or Not The Sessions Court's Analysis Of The Alleged Contemptuous Conduct Based On The Admissibility And Relevancy Of The Impugned WS At Trial Was Appropriate In Law

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[15] As we have intimated earlier above, the issue of whether or not a conduct of a litigant (or his solicitors) was contemptuous or not does not necessarily relate to whether or not such contempt would affect the merits or the determination of a case on its merits. When we speak of a proper and ethical conduct of litigants and solicitors as officers of the court, such matters transcend matters of merits. The old adage goes that justice must not only be done, but also must be seen to be done. And for justice to be seen to be done, the manner and method of solicitors chose to prop up their clients' case must also be made in solemn honesty, diligence, and integrity. Solicitors are first and foremost the officers of the court, before they are the protectors of the interest of their respective clients.

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[16] Thus, apart from the core merits of a case, the manner and method a solicitor chooses to apply the Rules of Court 2012's allowance of a witness statement (as means of examination-in-chief) is a separate ethical issue altogether.

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[17] Thus, we find that the Sessions Court's reliance on the admissibility and relevancy of the impugned WS as evidence at trial was unfortunately misplaced. It would be unsavoury and unwise for us to allow a state of practice or precedent that solicitors are allowed to put together any beneficial narrative they see fit as witness' testimony (without communicating or confirming with that witness) just so that they can take a chance that either:

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- (i) a witness under pressure from the witness stand would just play along and confirm whatever the solicitor suggests to be that witness' supposed testimony; or

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- A (ii) in case the witness outright denies ever consenting to the contents of a witness statement, that solicitor can just ‘clean house’ and opt not to call that witness nor refer to the witness statement that the solicitor had wrongly prepared and filed.
- B [18] Such a precedent is certainly undesirable. We disagree with the Sessions Court’s finding that the filing of the impugned WS was merely a ‘mistake’. This was neither an instance where a draft or incomplete ‘version’ of a witness statement was ‘mistakenly filed’. Instead, the impugned WS was knowingly filed notwithstanding the full knowledge that the solicitors have not communicated, consulted, nor have met Allen Martinez. The solicitors
- C knew they had not obtained proper confirmation from the intended witness and yet they found it acceptable to ignore the absence of personal confirmation. Instead, the solicitors felt it was appropriate to just rely on the instructions and confirmation of their client. The solicitors cannot entrust the responsibility to their client to obtain proper confirmation from the intended
- D witness. The solicitors held the ultimate key to file the impugned WS, and even without communicating with Allen Martinez, the solicitors saw it fit to proceed.
- E [19] Nor was this a case of a witness turning hostile against his prior communication or statements confirmed with the solicitors. Since the respondent’s solicitors had not considered that it was necessary to seek a formal confirmation from Allen Martinez prior to the filing of the impugned WS, it cannot be said that Allen Martinez had somehow now reneged or renounced his earlier statements allegedly confirmed in the impugned WS.
- F [20] The entire series of events above has nothing to do with the merits of the parties’ case, and yet the same series of events clearly reveals a conduct which went beyond ‘mistake’ and encroached the realm of inconsiderate presumptions and dishonesty. It is not the contents nor the veracity of the contents of the impugned WS that irritates and offended the face of the court, but it was the callous conduct of the solicitors in filing the impugned WS that
- G accords contempt of court.
- H [21] Thus, although we agree with the Sessions Court that the impugned WS would not be admissible as evidence under s. 73A of the Evidence Act 1950 as it was unsigned (see *Seow Hoon Hin v. Hartalega Holdings Bhd & Ors* [2019] 1 LNS 779), we still find that the inadmissibility or the non-reference of the impugned WS does not at all erase or evaporates the solicitors’ contemptuous conduct of improperly filing the impugned WS. Whether or not the impugned WS was referred to or even used at trial has nothing to do with the respondent’s solicitors’ conduct of improperly filing the impugned WS without ever consulting or personally confirming with Allen Martinez.
- I It is already an affront to justice for solicitors to ‘coach’ a witness, what more to insist a solicitor’s own words as a witness’ written testimony.

[22] The respondent might have successfully swept the improper filing of the impugned WS under the rug as far as the court's determination on merits is concerned. But the same cannot at all be said against the appellant's application in encl. 111 for contempt of court. We disagree with the Sessions Court's finding that the matter regarding the impugned WS is now academic just because the impugned WS was never evidence or was not referred to at trial.

[23] In fact, the fact that the case had already been put through full trial and had been determined in favour of the respondent, still does not relinquish the respondent's contemptuous conduct in improperly filing the impugned WS. There has never been a rule or precedent that contempt follows the event or outcome of the main litigation nor should there ever be such rule of law. Contempt remains a contempt no matter how meritorious the main case of the contemnor (or contemnor's client) would be.

[24] We are inclined to agree with the appellant's argument for deterrence to deter any likelihood of false testimony, no matter how remote, and to keep the court as far as possible free from even being filed any false or improper documents. We agree with the salutary words in *Sharma Kumari Oam Parkash v. PP* [2000] 1 LNS 123; [2000] 6 MLJ 790:

The system of justice will collapse if witnesses and deponents feel free to give false evidence or testimony (see Bhandulananda Jayatilake v. PP [1982] 1 MLJ 83 (FC)). Such acts are nothing but a contempt of our peers and of the administration of justice and is wholly contrary to the public interest. The making or giving of false evidence, if proven, must therefore be dealt with, with the clear objective of deterrence, not only of that individual from repetition, but also to deter others. To wait until such offences are rampant like drugs and traffic cases before taking strict action will put the administration of justice in jeopardy. ANY RISK of the court acting upon false evidence is unacceptable since it results in injustice. Any system of administration of justice that tolerates false statements in affidavits risks ridicule. (emphasis added)

[25] Nantha Balan J (now JCA) in the case of *Tan Sri Datuk Nadraja Ratnam v. Murali Subramaniam* [2017] 1 LNS 2263; [2017] MLJU 2307 has also referred to the case of *Sharma Kumari* above and found that any conduct which **may risk** the admission of false testimony is an affront to the administration of justice and shall be considered contempt of court. (emphasis added)

[26] It must be highlighted that the keyword is 'risk' of false testimony. Thus, the deterrence must go as far as to eliminate the 'risk' of false testimony and not only actual admission or reference to false testimony. Therefore, the respondent's argument that there was no contempt just because the impugned WS was not admitted as evidence does not at all wash the stain of contempt.

- A [27] We also found wisdom in the Commonwealth decision in *Kyle v. Legal Practitioners' Complaints Committee* [1999] WASCA 115:

In England, the ethical rule is that lawyers should not produce witness statements that they know to be false or where they know that the witness does not believe the statement to be true in all respects. Further, if, after filing a witness statement, a lawyer is put on enquiry as to the truth of the facts stated in the statement, the lawyer should, where practicable, check whether those facts are true. If the lawyer then discovers that the witness statement which has been served is incorrect, the lawyer must inform the other parties immediately ... In my view this rule reflects the duties that lawyers in this country owe to the court.

(emphasis added)

- C [28] We would expand further that apart from a solicitor's duty to enquire after the filing of a witness statement, a solicitor would also be put on enquiry, wherever and whenever practicable before the filing of the witness statement, to check with the witness himself, whether those facts in the witness statement were true. It should be obvious that a solicitor must practice utmost due diligence to verify the authenticity of any document (inclusive of witness statements) prior to the filing of the same. There should be no reason whatsoever that witness statements should be exempted from the same duty of due diligence. And the respondent's contempt is considerably more explicit due to the admission that the respondent's solicitors did not even bother to reach out to Allen Martinez for a personal confirmation of the contents of the impugned WS.

- F [29] Closer to home, we refer to the Privy Council's decision in *Rajasooria v. Disciplinary Committee* [1955] 1 LNS 107; [1955] 1 MLJ 65, in which the Privy Council admonished the conduct of a solicitor who knowingly and deliberately submitted a false document to be an improper conduct akin to 'deceit':

For an advocate and solicitor knowingly and deliberately to submit a false document intending to be acted upon was grossly improper conduct as being dishonourable both to himself and to his profession. The submission of such a document with such intention in itself involved an element of deceit.

- H [30] Although the degree of falsity involved in *Rajasooria* is more severe than that of the impugned WS in the present appeal, we find that there should be no room or space at all to negotiate an improper document notwithstanding the severity of the impugned WS's falsehood. It matters not to us if the contents of the impugned WS might contain any degree of truth, but we still cannot ignore or neglect the unethical manner in which the impugned WS was prepared and falsely insinuated to be the words and testimony of Allen Martinez. The unethical preparation and filing of the impugned WS itself (besides the contents of the impugned WS) already contains some element of 'deceit'.

[31] Considering all of the above deliberations, we answer issue 1 in the negative. It was plainly wrong for the Sessions Court to dismiss encl. 111 merely on the basis of the inadmissibility and non-reference of the impugned WS at trial. Whether or not the impugned WS was admitted as evidence to affect the merits of the case is altogether a separate matter than that of the manner and method the impugned WS was unethically prepared and filed by the respondent.

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Issue 2

Whether Or Not The High Court's Finding That The Sessions Court's Dismissal Of Encl. 111 (Committal Application) Was An Unappealable 'Ruling' Instead Of A 'Decision' Was Appropriate In Law

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[32] We have examined the brief grounds of judgment of the learned High Court Judge ("learned judge") and unfortunately found that the learned judge's decision was made *per incuriam* and contrary to the plain wordings and workings of O. 55 r. 5 of the Rules of Court 2012.

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[33] First and foremost, the learned judge himself has misguided himself as to the simple definition of a decision as defined under O. 55 of the Rules of Court 2012. Initially, the learned judge has correctly appreciated that O. 55 r. 1 of the Rules of Court 2012 defines 'decision' as "judgment, order and decree." The learned judge also properly appreciated that the same provision allows for appeals against decisions after full trial (specifically O. 55 r. 3 of the Rules of Court 2012), **(and also against decisions before full trial (specifically O. 55 r. 5 of the Rules of Court 2012))**. (emphasis added)

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[34] Nonetheless, although appreciating the provisions above, the learned judge somehow found that the Sessions Court's order to dismiss encl. 111 was merely a 'finding' and not an appealable decision under O. 55 of the Rules of Court 2012. The supposed reason afforded was that the committal application would somehow 'prejudice' the trial as the truth of Allen Martinez's testimony (and the contents of the impugned WS) was still *sub judice* and yet to be tested at trial. However, this supposed ground on 'prejudice' was never supported by any provision or any precedent within the learned judge's grounds of judgment.

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[35] We found that it is plain to see that firstly, the Sessions Court's decision to dismiss encl. 111 was indeed an appealable decision before full trial under O. 55 r. 5 of the Rules of Court 2012. The appellant applied for committal proceedings, and the Sessions Court decided to dismiss encl. 111 and even ordered costs against the appellant. This was a decision and an order of the Sessions Court before trial which falls squarely under O. 55 r. 5 of the Rules of Court 2012.

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- A [36] Secondly, as we have found earlier, the issue of admittance or reference to the impugned WS at trial is altogether a separate issue from the improper and unethical manner in which the impugned WS was prepared and filed by the respondent. Thus, the committal proceeding bears no effect against the merits of the case at trial. The contemptuous conduct does not
B depend on the falsehood of the contents of the impugned WS, but instead the unethical manner the impugned WS was prepared and filed.

- [37] Furthermore, even if the case were to proceed to full trial, the veracity and truth of the contents in the impugned WS would not necessarily be tested as the impugned WS would not have been admitted as evidence to be referred
C to during the trial. Thus, we cannot simply allow the respondent to be left unscathed, considering their improper conduct in preparing and filing the impugned WS. As we have stated earlier, we cannot allow the respondent to simply wash their hands when they were caught red-handed for improperly preparing and filing the impugned WS.

- D [38] Considering all of the above in this part, and on the precedents referred to in our judgment in issue 1, we also answer issue 2 **in the negative**. The learned judge has erred in dismissing the appellant's appeal on the basis that the Sessions Court's decision was an unappealable 'ruling'.

(emphasis added)

E **This Court's Decision**

- [39] All of the above deliberations considered, we find that there are merits in the present appeal. Thus, we allow the present appeal (Appeal 235). Therefore, the Sessions Court Judge's as well as the learned High Court
F Judge's decisions, findings, and orders are hereby reversed and set aside. We also accordingly allow the appellant's encl. 111 at the Sessions Court to cite the respondent and the respondent's solicitors for contempt. We also order that the respondent be liable to pay costs to the appellant.

- [40] In respect of Appeal 152, we noted that at the beginning of the hearing of both appeals, learned counsel for the appellant had informed us that the
G appellant intended to withdraw Appeal 152 and sought leave to withdraw the said appeal. However, the counsel for the respondent had taken the position that the respondent is entitled to costs on such withdrawal.

- [41] On the issue of costs, this court also orders that the respondent is liable to pay costs of RM20,000 (here and below) to the appellant in respect of
H Appeal 235, subject to payment of allocatur. With respect to the withdrawal of Appeal 152 by the appellant, the appellant is to pay the respondent costs of RM5,000 subject to payment of allocatur.

- [42] Finally, this court orders that the case to be remitted back to the
I Sessions Court Kuala Lumpur for the contempt proceedings to proceed.
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